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Supreme Court, U.S.
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NO. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1988

INDUSTRIAL STEEL PRODUCTS CO., INC. AND
MOSHER STEEL COMPANY
Petitioners,

v.

ANN MCLAUGHLIN, Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In Camara v. Municipal Court, 387 U.S. 523 (1967) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) this Court held search warrants are required to conduct administrative, regulatory inspections. In lieu of the showing of probable cause traditionally required under the Fourth Amendment, the Court held administrative warrants could issue upon a showing that "reasonable administrative standards" are satisfied with respect to a particular establishment. The issues here are:

1. What did this Court mean by "reasonable administrative standards?" Can an admittedly discriminatory enforcement scheme qualify as "reasonable?"

2. When an administrative warrant is challenged, does the administrative agency have the burden of demonstrating that its administrative standards for inspection are reasonable? Or was the court below correct in holding the business owner has the burden of affirmatively showing the administrative standards are unreasonable, and that the agency *intended* its standards for inspection to be unreasonable?

PARTIES TO PROCEEDING IN COURT BELOW

Industrial Steel Products Co., Inc. is located in Shreveport, Louisiana, and challenged the constitutional fairness of OSHA's administrative inspection plan in the United States District Court for the Western District of Louisiana. Mosher Steel Company is located in Houston, Texas, and raised a similar challenge in the United States District Court for the Southern District of Texas. On appeal to the Fifth Circuit the two cases were combined for oral argument, and the Fifth Circuit issued a joint opinion. Both parties join as petitioners to this Court.

The parent company of Industrial Steel Products Co., Inc. and Mosher Steel Company is Trinity Industries, Inc.

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NO. _____

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v.

ANN MCLAUGHLIN Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, INDUSTRIAL STEEL PRODUCTS AND MOSHER STEEL, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 31, 1988.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals *(see,* App. *infra)* is reported at 845 F.2d 1330.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on May 31, 1988. A timely Petition for Rehearing was denied on June 27, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

Local OSHA officials in Shreveport and Houston obtained administrative warrants to inspect Industrial Steel Products and Mosher Steel, respectively. The warrants were based on CPL 2.45A, OSHA's administrative standard or "plan" for scheduling inspections of plants for which specific safety violations have not been reported. Under the Fifth Circuit's decision in *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985), OSHA was required to include its statewide industry ranking report in the warrant application, to enable the magistrate to determine whether the inspection plan is fair and nondiscriminatory. In both

Industrial Steel Products' case and Mosher Steel's case the industry ranking report, when read in conjunction with the relevant state manufacturers' directory, revealed that many high hazard businesses, including many direct competitors, were not included under the inspection plan and were *de facto* exempt from enforcement. The companies believed this information confirmed OSHA's inspection plan was discriminatory and unreasonable and provided for selective enforcement of the Occupational Safety and Health Act. Both companies therefore filed motions to quash the administrative inspection warrants. Separate hearings were held in Shreveport and Houston. In each case the federal magistrate declined to consider evidence of discriminatory enforcement and denied the motion to quash. Both companies appealed from the magistrate's findings of fact and recommendations. The district courts for the Western District of Louisiana and the Southern District of Texas adopted the magistrates' findings of fact and recommendations and denied the motions to quash. Industrial Steel Products and Mosher Steel appealed to the Fifth Circuit.

The Fifth Circuit acknowledged, in Industrial Steel Products' case, that more than half of Industrial Steel Products' direct competitors were excluded from enforcement and would never be inspected, while under CPL 2.45A Industrial Steel Products would continue to be inspected and reinspected at least once every three years. (Indeed, the Secretary of Labor, in her briefs, also conceded this to be true.) However, rather than requiring OSHA to reveal how its inspection list was compiled or why these competitors were exempted, the Fifth Circuit *excused the discriminatory enforcement because Industrial Steel Products had not proved it was intentional.* 845 F.2d at 1337. In effect, the Fifth Circuit held that OSHA has no obligation to take steps to make

sure its inspection plan is fair. Bureaucratic sloppiness that results in discriminatory, selective enforcement is permissable so long as it is not intentional. Moreover, the Fifth Circuit concluded that the business owner has the burden of proving OSHA's inspection plan is unreasonable and discriminatory, and also that the discriminatory enforcement was intentional. And in meeting that burden, the business owner may not go outside the four corners of the warrant application itself. 845 F.2d at 1337, 1332.

REASONS THE WRIT SHOULD BE GRANTED

Since this Court's decision in *Barlow's* there have been scores of lower court cases dealing with the proper showing of probable cause for an administrative inspection warrant. Circuit courts of appeals, district courts and state courts have divided on what constitutes "reasonable administrative standards" for purposes of inspection. One court has even lamented the "embarrassment of riches" in the number of OSHA warrant cases and in the disparities between circuits and even between districts and within districts as to what constitutes probable cause for an OSHA search. *In the Matter of Establishment Inspection of Urick Property,* 472 F.Supp. 1193, 1194 (W. D. Pa. 1979). Indeed, there have been numerous petitions to this Court by different business owners for further guidance on these administrative probable cause and scope of the warrant issues.

The Secretary of Labor has never liked the holding in *Barlow's* and has resisted complying with that decision. Over the course of the post-*Barlow's* litigation to shape the constitutional rights of business owners *vis a vis* OSHA the Secretary of Labor has adopted varying, inconsistent, even devious litigation strategies to win judicial holdings that the constitutional fairness of OSHA's administrative standard,

or "plan," for inspection is not subject to judicial review. In the instant case the Secretary took the position that OSHA may utilize any type of inspection plan it wants, even if the plan is discriminatory and enforces the law selectively, and the court must accept that plan as probable cause for a warrant under *Barlow's* unless the establishment owner can affirmatively demonstrate that an incomplete inspection list or other deficiency is the result of an intentional, capricious act on the part of OSHA officials.

Barlow's specifically holds the Secretary must affirmatively demonstrate that OSHA's inspection plan is reasonable and fair, and that the business to be inspected has been selected in a neutral, nondiscriminatory manner. However, in this case the Fifth Circuit adopted the Secretary's position and effectively reversed this rule. Rather than requiring the agency to affirmatively show its inspection plan is reasonable and fair, or to justify the exclusion of a large sector of high hazard businesses from enforcement, the Fifth Circuit held the business owner has the burden of proving *both* that the inspection plan is discriminatory *and* that OSHA *intended* to enforce the act in a discriminatory manner. 845 F.2d at 1337. In making such a showing the Fifth Circuit held the business owner may not go beyond the four corners of the warrant application itself. The Fifth Circuit thus imposed an impossible burden on a business owner who is the subject of discriminatory enforcement. How can a business owner *ever* prove that his competitors were *intentionally* left off the inspection list? He obviously cannot. The business owner is therefore left to endure the disruption to production and inconvenience to employer and employee alike of comprehensive OSHA inspections, year after year, while his competitors are not subjected to these disruptions and enforcement costs. The Third Circuit has noted that

even if the business owner operates a safe establishment in compliance with OSHA regulations, these repeated inspections put him at a competitive disadvantage.

> . . . a typical OSHA inspection is more than an unobtrusive scrutiny. Inspections of entire plants — referred to as 'wall to wall' in agency jargon — frequently extend over several weeks. They necessarily create inconvenience to the employer and a certain amount of lost time for employees who escort the inspector or are otherwise disrupted in their work. Even if no violations were found and no citations issued, an employer would not regard such an inspection as benign. (footnotes omitted).

Cerro Metal Products v. Marshall, 620 F.2d 964, 974 (3rd Cir. 1980).

The Fifth Circuit's decision makes a mockery of *Barlow's* insistence on Fourth Amendment protections for business owners. Under the Fifth Circuit's decision OSHA can, as a practical matter, devise any sort of enforcement scheme it wants. The agency can utilize an inspection list that excludes ninety-nine percent of the businesses in a state. Or the agency can enforce the Act against steel mills on the north side of the street but not on the south side. As long as the agency represents in the warrant application that its inspection scheme has been "properly applied," 845 F.2d at 1337, the court must rely on those representations and the inspection target has no remedy. Such a procedure amounts to a rubber stamp of OSHA's decision to inspect, and flies in the face of *Barlow's.*

In the present case Industrial Steel Products introduced evidence to show more than half of all high hazard businesses were exempt from enforcement under CPL 2.45A and that OSHA had omitted fifty out of ninety-two of Industrial Steel Products' direct competitors in Louisiana. The Fifth

Circuit acknowledged this evidence but held that was not enough; that Industrial Steel Products must also show, from the four corners of the warrant application itself, that this omission and discriminatory enforcement was intentional. It could be argued that the mere showing of such wide-spread, blatant, discriminatory enforcement in and of itself shows intent. It could hardly be an oversight. Nevertheless, the point is, that by requiring such a showing the Fifth Circuit has effectively reversed the Secretary's burden established in *Barlow's*, and negated the business owner's Fourth Amendment protections by taking away any practical possibility the business owner could *ever* effectively challenge an OSHA warrant.

CONCLUSION

The heart of the Fifth Circuit's decision is its statement that "OSHA is not required to demonstrate that the plan was applied neutrally to every establishment on the list." 845 F.2d at 1337. That holding is in direct conflict with this Court's statement in *Barlow's* that "reasonable legislative or administrative standards for conducting an inspection [must be] satisfied *with respect to a particular* [establishment]." 436 U.S. at 320, (emphasis added).

Petitioners respectfully request this court to therefore issue a writ of certiorari to review the opinion of the Fifth Circuit, and upon review to reverse the holding of the courts below; elaborate on the probable cause showing required for administrative warrants; reaffirm that the agency has the

burden to demonstrate its inspection plan is reasonable; and set forth the procedure for challenging the constitutional fairness of an agency's inspection plan.

Respectfully submitted,

ORIGINAL SIGNED BY
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to Ms. Barbara A. W. McConnell, U.S. Department of Labor, Office of the Solicitor, 200 Constitution Ave., N.W., Washington, D.C. 20210, on this 25th day of August, 1988

ORIGINAL SIGNED BY
ROBERT E. RADER, JR.

APPENDIX A

In the Matter of INDUSTRIAL STEEL PRODUCTS CO., INC., Appellant,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION and Secretary of Labor, Appellees.

In the Matter of ESTABLISHMENT INSPECTION OF MOSHER STEEL COMPANY.

UNITED STATES of America, Plaintiff-Appellee,

v.

MOSHER STEEL COMPANY, Defendant-Appellant.

Nos. 87-2748, 87-4519.

United States Court of Appeals, Fifth Circuit.

May 31, 1988.

Before CLARK, Chief Judge and REAVLEY, Circuit Judge and HUNTER,* District Judge.

CLARK, Chief Judge:

The district court affirmed a magistrate's denial of motions to quash two administrative search warrants authorizing programmed safety inspections of steel plants by the Occupational Safety and Health Administration (OSHA). Finding that affidavits by local OSHA agents, OSHA programmed inspection instructions and statewide industry ranking reports provided probable cause to issue the warrants, we affirm.

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* District Judge of the Western District of Louisiana, sitting by designation.

I.

We are asked to decide whether the magistrates in these consolidated cases had probable cause to issue administrative search warrants under § 8(a) of the Occupational Safety and Health Act, 29 U.S.C. § 657(a) (1985) ("the Act"). The warrants, issued in ex parte proceedings as authorized by 29 C.F.R. § 1903.4(d) (1987), permitted programmed safety inspections of Industrial Steel Products Co.'s Shreveport steel fabrication plant and Mosher Steel Products Co.'s Houston steel plant to ensure compliance with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1985).

Industrial and Mosher were selected for programmed safety inspections based on CPL 2.45A, OSHA's standard instructions for scheduling inspections of plants for which specific safety violations have not been reported.[1] Local OSHA officials secured administrative search warrants after Industrial and Mosher refused to consent to the inspections. Having secured the warrants, OSHA officials again notified Industrial and Mosher that their plants would be inspected. Again they refused to consent and instead filed motions to quash the administrative inspection warrants. Separate hearings were held and federal magistrates denied both motions. Industrial and Mosher timely appealed the magistrates' findings of fact and recommendations. In orders dated June 8, 1987 and June 10, 1987, the district courts for the Southern District of Texas and the Western District of Louisiana adopted the magistrates' findings of fact and recommendations and denied the motions to quash. Industrial and Mosher appeal. We Affirm.

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[1] CPL 2.45A defines programmed inspections as: "Inspections of worksites which have been selected based upon objective criteria . . . The worksites are selected according to national scheduling plans for safety and for health or special emphasis programs." United States Department of Labor, Office of Compliance Programming, OSHA Instruction CLP 2.45A at II-1 (revised Apr. 18, 1983).

They are distinguishable from unprogrammed inspections which are: "Inspections in which alleged hazardous working conditions have been identified at a specific worksite . . . This type of inspection responds to imminent dangers, fatalities/catastrophes, complaints and referrals. It also includes followups." *Id.*

II.

In reviewing a magistrate's determination of probable cause, this court may only consider material which the issuing magistrate had before him. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978); *United States v. Melancon*, 462 F.2d 82, 89-90 (5th Cir.1972), *cert. denied*, 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 (1972). Evidence outside of the warrants may only be examined if the applications were tainted by fraud or misrepresentation. *Franks*, 98 S.Ct. at 2684. Because no allegation of fraud has been made, we will confine our review to the documents submitted with the warrant applications.

The Occupational Safety and Health Act authorizes the Secretary of Labor to enter and inspect work places at reasonable times and in a reasonable manner to ensure compliance with the provisions of 29 U.S.C. §§ 654(a)(1) and (2).[2] In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Supreme Court held § 657(a) unconstitutional insofar as it purported to authorize nonconsensual, warrantless inspections. *Barlow's*, 98 S.Ct. at 1827. However, the Court construed the Act to permit inspections pursuant to administrative search warrants which could be obtained upon a showing of: (1) "specific evidence of an existing violation," or (2) "'that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Barlow's*, 98 S.Ct. at 1824 (*quoting Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967)).

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[2] The Act states that the Secretary may:

"(1) enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

29 U.S.C. § 657(a) (1985).

In *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir.1985), this Circuit considered the adequacy of OSHA's application for a warrant authorizing the entry of an establishment selected under OSHA's programmed health inspection plan. The panel in *Gretna* made its analysis in two parts. The first considered whether OSHA's health inspection plan met the specific neutral criteria mandated by the Supreme Court in *Barlow's*. The *Gretna* panel concluded it did.

In analyzing an inspection plan, the magistrate considering the warrant application must "review the plan itself to ensure that it contains the specific neutral criteria mandated by *Barlow's.*" *Gretna*, 769 F.2d at 1112. Essentially, this part of the test requires the magistrate to determine that the plan as a whole is susceptible of neutral, nonarbitrary application.

[1] We are satisfied that this prong was met in Industrial's and Mosher's case. The magistrates reviewed copies of CPL 2.45A and descriptions of the programmed inspection plans submitted with the warrant applications. Our examination of this same material discloses that CPL 2.45A and the inspection plans are based on specific, neutral criteria.

The plan states that the national OSHA office will provide each regional office with a statewide industry ranking report classifying all industries within the state under a Standard Industrial Classification (SIC) code. The SIC code is a four-digit number which classifies industries by what they manufacture (for example, wood partitions and fixtures or canned and cured seafoods). All industries within a given SIC code are then assigned a Lost Work Day Injury (LWDI) rate calculated by the Bureau of Labor Statistics. The LWDI rate reflects the average number of work days per 100 full-time employees lost by employees in that industry as a result of occupational injury or sickness.

To target specific businesses within a state for inspection, OSHA's national office provides each regional office with establishment lists stating the names and addresses of all

businesses in the state in each SIC code on the statewide industry ranking report. There is one establishment list for high-hazard industries (defined as industries with an LWDI rate above the national average of 3.4), one for low-hazard industries, and one for nonmanufacturing industries. The national office obtains these names and addresses from Dun's Marketing Service. The establishment lists rank industries in descending order starting with the industry in the SIC codes having the highest LWDI rate. Within each SIC code, businesses are separated by county and then placed in alphabetical order.

Using specific criteria supplied by OSHA's area director, the regional office then adds or deletes establishments from the high-hazard establishment list. An establishment may only be added if it has more than ten employees but the national office thought it had fewer than ten, or if it was unlisted but is believed to be within an SIC code on the statewide industry ranking report. An establishment may only be deleted if: it cannot be located, is no longer in business, is out of area office jurisdiction, is a nonplant corporate office, has been listed under an incorrect SIC code and the correct SIC code is not on the statewide industry ranking report, a safety inspection has been conducted within the current or previous two fiscal years, it has ten or fewer employees, or its actual LWDI rate is found to be lower than the national average during an OSHA health inspection. Deletions may be made for other reasons only upon the approval of OSHA's regional administrator and director of field operations. After additions and deletions have been made, establishments on the list are numbered consecutively.

Next, each regional office compiles an inspection register naming establishments within its jurisdiction which will be inspected during the current fiscal year. The number of establishments on the register is determined by doubling the number of programmed inspections projected for the fiscal year (to account for establishments later found to be exempt) and subtracting any uncompleted inspections carried over from the previous fiscal year. Ninety percent of

that number is taken in rank order from the top of the high-hazard establishment list. Five percent is selected randomly from the low-hazard establishment list and five percent from the nonmanufacturing list. The random selections give low-hazard and nonmanufacturing businesses incentive to comply with OSHA guidelines. The register is then divided into two equal cycles. With certain limited exceptions, each establishment in the first cycle (the "worst" establishments) must be inspected before the second cycle is begun. Within each cycle, establishments may be inspected in the order that makes the most efficient use of OSHA's resources. Establishments on the register will be exempt from a comprehensive inspection if a preliminary review of their OSHA logs and injury records reveals a lower than average LWDI rate. However, every "tenth establishment" will receive a full-scale inspection regardless of its actual LWDI rate. This assures that even if businesses falsify their injury records, they still may be subject to inspection.

This plan is based on specific, neutral criteria. Establishments employing the most workers and having the highest LWDI rates are subject to the most frequent inspections. OSHA's assertion that it has insufficient resources to inspect every establishment is undisputed. Thus, it is reasonable for OSHA to concentrate on the largest, most dangerous businesses. The addition of some low-hazard and non-manufacturing firms to the register and the comprehensive inspection of some firms with low actual LWDI rates enhances the plan's neutrality. These devices further OSHA's legitimate goals of encouraging all firms to comply with its regulations and discouraging firms with high LWDI rates from manipulating accident statistics to avoid comprehensive inspections.

Inspecting firms within a cycle in the order that makes the most efficient use of OSHA's resources casts no shadow on the plan's neutrality. Establishments from the top of the high-hazard list will be in the first cycle and will all be inspected before inspection of the lower-hazard firms in the second cycle begins. In an inspection scheme as pervasive as this one, maintaining precise order is neither always possible nor essential to neutrality. Subjecting a high-hazard firm

with a slightly lower LWDI rate to inspection before a higher-hazard firm is not arbitrary. *See, e.g., Donovan v. Trinity Industry, Inc.*, 824 F.2d 634, 636 (8th Cir.1987). All firms within a cycle will be inspected in the space of several months in any case. Rearranging their order within the cycle is not discriminatory as Industrial and Mosher contend. Because it furthers OSHA's legitimate goal of efficient resource allocation, it is reasonable.

Industrial argues that the plan is not neutral because firms on the top of the high-hazard establishment list are repeatedly inspected while firms on the bottom of the list may never be inspected. By way of illustration, Industrial states that there are approximately 1400 firms on the Louisiana high-hazard establishment list. If the 300 firms from the top of the list are placed on the register each year, and are only exempt if they've been inspected in the past two years, then the 500 firms on the bottom of the list will never be subject to inspection.

Industrial's agrument assumes that the establishment lists are unvarying from year to year. This is not the case. Indeed, the whole purpose of OSHA inspections is to cause LWDI rates to change for the better.

Businesses move up and down the establishment list each year as the LWDI rate for their SIC code changes. Mosher Steel is a prime example. The LWDI rate for SIC Code 3441 establishments in Texas was 7.0 in 1985 and had changed to 8.9 by 1986. Hence, it is not true that firms on the top of the establishment list will remain at the top and be subject to repeated inspections. Most high-hazard businesses will eventually be fair game for inspection as they move up or down the list. With this in mind, it is legitimate for OSHA to single out for inspection firms appearing at the top of the high-hazard list in a given fiscal year.

III.

Gretna also required the magistrate be able to determine that the business opposing the warrant was appropriately selected for inspection under the plan's neutral criteria. This determination requires the magistrate's "consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment." *Gretna*, 769 F.2d at 1112. *Gretna* goes on to state that the magistrate "should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the establishment list and the actual inspection history of the business in question." *Gretna*, 769 F.2d at 1112. Because the warrant applications in today's cases supplied this information, it is unnecessary for us to decide whether this precatory language should be read as essential to any finding of probable cause.

The warrant applications before us contain more than enough information to support the magistrate's findings that OSHA had satisfied the second part of *Gretna*. Each application appended a copy of the applicable statewide industry ranking reports. Affidavits submitted with the warrants reviewed the methodology used to select Industrial and Mosher and appended copies of CPL 2.45A. One affidavit was sworn to by a local OSHA compliance officer and the other by an OSHA safety supervisor.

Industrial and Mosher argue that the affidavits failed to establish probable cause because they were not based on personal knowledge. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). They contend that not only did the affiants fail to allege personal knowledge, but, in fact, they did not have personal knowledge because they did not know how the establishment lists were compiled or what local additions or deletions had been made to the lists. Additionally, one affiant was not involved in scheduling inspections and did not personally review the statewide industry ranking report, the inspection register or the establishment list.

Industrial and Mosher are giving an unduly technical and restrictive reading to the affidavits. *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 747, 13 L.Ed.2d 684 (1965). One affiant, a compliance officer, regularly conducted OSHA inspections. The other, a safety supervisor, was responsible for enforcing the Act in 26 Texas counties and for scheduling inspections to be conducted by compliance officers. Both have gained sufficient personal knowledge in the course of these duties to testify regarding the procedures used to select establishments for inspection. Additionally, the affiants are entitled to rely on the actions and observations of their fellow OSHA personnel to supplement their own personal knowledge. *Ventresca,* 85 S.Ct. at 747; *United States v. Flynn,* 664 F.2d 1296, 1303 (5th Cir.1982), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982).

The Secretary argues that Mosher is collaterally estopped from arguing lack of personal knowledge because the issue was previously litigated and decided adversely to its parent corporation, Trinity Industries. *See, Donovan v. Trinity Industries, Inc.,* 824 F.2d 634, 636 (8th Cir.1982). However, the Secretary waived the affirmative defense of collateral estoppel by failing to raise it before the district court. *Mozingo v. Correct Manufacturing Corp.,* 752 F.2d 168, 172 (5th Cir. 1985).

Each affidavit contains a detailed description of how the plan was executed.[3] These affidavits contain ample information to enable the magistrates to decide that Industrial and Mosher were appropriately chosen by an application of the plan's neutral criteria.

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[3] Both Industrial and Mosher fell within SIC Code 3441 which carried a high-hazard LWDI rate of 8.9 for the State of Texas and 9.7 for Louisiana in 1986. The affidavits state that 329 inspections were projected in Baton Rouge for fiscal year 1986 (with an additional 162 carried over from fiscal year 1985) and 179 in Houston. They state that these numbers were doubled, the number of inspections carried over was subtracted, and ten percent of the total was subtracted to allow for inspections of low-hazard and nonmanufacturing establishments. The resulting number of establishments, 429 for Baton Rouge and 356 for Houston, were taken in rank order from the top of

Information regarding the Secretary's perception of the desired frequency of inspections also was available for the magistrates' consideration. The affidavits state that, pursuant to the plan, an establishment will be exempt if it has undergone a programmed or unprogrammed safety inspection within the previous two fiscal years or the current fiscal year. The plan indicates that high-hazard establishments should be inspected for safety no more often than once every two to three years. Both Industrial and Mosher have been inspected somewhat more frequently. However, neither has been inspected within the previous two years.[4]

Mosher contends that it has not been inspected in accordance with the Secretary's desired frequency because the affidavit misrepresented its actual inspection history. However, even under Mosher's version of its history, it would not qualify for an exemption by reason of inspection in the previous two fiscal years or the current fiscal year.

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the high-hazard establishment lists and placed on the inspection registers. Industrial and Mosher were chosen using this method and were placed in the first cycle one of their respective registers. Mosher was carried over from the 1985 inspection register and was scheduled for a comprehensive inspection because its records did not reveal an actual LWDI rate lower than the national average. Industrial was selected in fiscal year 1986. Although its injury records revealed an actual LWDI rate below the national average, it was scheduled for a comprehensive inspection as a tenth establishment.

[4] Mosher's actual inspection history as represented in the affidavit was as follows:

Date	Action	Result
8/10/76	Inspection	No citation issued
10/11/77	Inspection	No citation issued
1/31/78	Inspection	Serious citation and non-serious citation issued
9/15/78	Inspection	Serious citation and non-serious citation issued
1/31/80	Inspection	No citation issued
5/22/83	Inspection	Non-serious citation issued

Industrial's inspection history was as follows:

Date	Action	Result
4/29/77	Safety inspection	[None listed]
5/18/77	Health inspection	[None listed]
8/3-10/77	Follow-up	[None listed]
9/3/81	Safety inspection	[None listed]
7/21/83	Safety inspection	[None listed]

The affidavits and plan enabled the magistrate to determine that Industrial and Mosher were selected for inspection through an application of the plan's specific, neutral criteria. However, Industrial and Mosher argue that *Gretna* imposes an additional requirement — that the relevant establishment lists and/or the inspection register be appended to the warrant applications.[5] Industrial and Mosher find support for this argument in a portion of *Gretna* which reads:

> "But the application contained neither the establishment list nor a description of the procedure followed in the selection of Gretna.
>
> . . . .
>
> . . . Indeed, OSHA provided the court in this case with an industry rank list from Connecticut and an establishment list from a county in Massachusetts. We see no reason why OSHA could not have provided the court with the relevant lists from Louisiana, encoded to protect the identity of other inspection targets."

769 F.2d at 1113 and n. 6.

[2] Industrial and Mosher interpret this language to *require* that encoded establishment lists be appended to every warrant application. They argue that without encoded

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[5] No other Circuit requires OSHA to append establishment lists to their warrant applications. In fact, no other Circuit requires that OSHA append statewide industry ranking reports. *See, e.g., Pennsylvania Steel Foundry & Machine Co. v. Secretary of Labor*, 831 F.2d 1211, 1215 (3rd Cir. 1987) (warrant application need only describe the program and aver that the work site fits within the program); *Donovan v. Trinity Industries, Inc.*, 824 F.2d 634, 636 (8th Cir. 1987) (warrant application must contain a detailed description of the plan and the procedure used to select an establishment for inspection); *Donovan v. Enterprise Foundry, Inc.*, 751 F.2d 30, 33 (1st Cir. 1984) (affiant need only explain plan and state that the firm was chosen pursuant to its neutral criteria); *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 988-89 (9th Cir. 1980) (warrant application must explain plan, aver that company was selected according to plan and cite above-average injury rate in relevant industry).

establishment lists or inspection registers, the magistrate cannot determine if local additions and deletions have been properly made to the list, if the list is in worst-first order, if it is complete and if it was compiled by a correct application of the neutral criteria. Industrial and Mosher state that a simple description of how the establishment lists were compiled is not adequate because without the lists themselves, the magistrate can't ascertain that the neutral procedures were actually used.

A footnote in *Gretna* observed that local additions and deletions are a matter for concern because "[o]therwise, OSHA officers could harass businesses or effectively exercise the kind of unbridled discretion which concerned the Supreme Court in *Barlow's.*" *Gretna,* 769 F.2d at 1113, n. 7. However, they are not a problem in this case because the affidavits alleged that only local additions and deletions "appropriate" under CPL 2.45A were made. In the absence of evidence to the contrary, the magistrates are entitled to rely on these representations. Neither Industrial nor Mosher attempted to show that they were inappropriately added at the local level because they were both on the lists supplied by the national office.

Industrial contends that many of its competitors were inappropriately deleted from the establishment list. It cites statistics from the Louisiana Department of Commerce placing 93 businesses in Louisiana in SIC Code 3441. OSHA's Statewide Industry Rank Report for Louisiana only listed 42 businesses in Louisiana under SIC Code 3441. However, because these "deletions" did not occur at the local level, they do not raise the concerns expressed in *Gretna.* Nor can we conclude from anything shown by Industrial that the national office arbitrarily deleted Industrial's competitors from the list. OSHA applies its programmed inspection plan nationwide and therefore uses national directories classifying establishments by SIC code. OSHA couldn't feasibly rely on state directories because not all states publish them, some classify industries using different criteria than the national directory, some states use

their directories for advertising purposes so businesses represent that they deal in more than one industry and some states publishing directories don't require that businesses include information in them.

Gretna does not mandate that an encoded establishment list or inspection register be adduced in the application for an administrative warrant in order to show probable cause. Local officials have the option of supplying either an encoded establishment list or the register; or, a description of how the list and register were compiled. The test is whether the magistrate can be satisfied that the target establishment was placed on the register by an application of the plan's specific, neutral criteria. The absence of an encoded establishment list will only be fatal to a warrant application where the target company can make a factual showing that it was placed on the list for reasons other than the application of specific, neutral criteria.[6]

Industrial's and Mosher's suggestion that the magistrate should review the establishment list for completeness and neutrality would, in effect, require the magistrate to determine that every firm on the list was fairly placed there and that no firm was unfairly deleted. The Fourth Amendment does not impose such stringent requirements. To meet the standards set by *Barlow's*, the magistrate need only conclude that an application of the neutral plan resulted in the selection of the individual establishment contesting the warrant. Absent a specific factual showing by the firm contesting enforcement of the warrant, OSHA is not required to demonstrate that the plan was applied neutrally to every establishment on the list.

If a contestant puts forward proof that businesses were arbitrarily added to or deleted from the list, the court can no longer rely on the affiant's representations that a specific neutral plan had been properly applied. Such a showing

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[6] Requiring that an applicant for an administrative search warrant submit *either* the inspection register or establishment list; or, a description of the procedures involved comports with the Eighth Circuit's view. *See Donovan v. Trinity Indus., Inc.* 824 F.2d 634, 637 (8th Cir. 1987).

In The United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 87-4519

IN THE MATTER OF:

INDUSTRIAL STEEL PRODUCTS CO., INC.
Appellant,

versus

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION
and SECRETARY OF LABOR,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/31/88, 5 Cir., 198__, _____F.2d ____)
(June 27, 1988)

Before CLARK, Chief Judge, and REAVLEY, Circuit Judge and HUNTER,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK

United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

Supreme Court, U.S.
FILED
AUG 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1988

INDUSTRIAL STEEL PRODUCTS CO., INC. AND
MOSHER STEEL COMPANY
Petitioners,

v.

ANN MCLAUGHLIN, Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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CLERK,
U.S. DISTRICT COURT
SOUTHERN DISTRICT
OF TEXAS
FILED
June 8, 1987
Jesse E. Clark, Clerk
By Deputy D. Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In the Matter of Establishment Inspection of
MOSHER STEEL COMPANY

Inspection Warrant
Docket No. H-86-233M

ORDER

After consideration of Magistrate Kelt's recommendation and the objections of Mosher Steel to that recommendation, the Court is of the opinion that the recommendation should be approved for the reasons stated in the magistrate's memorandum and recommendation. Therefore, the motion to quash the inspection warrant is DENIED. The inspection warrant shall be executed forthwith.

IT IS SO ORDERED.

Done at Houston, Texas, this 8th day of June 1987.

NORMAN W. BLACK

NORMAN W. BLACK
United States District Judge

CLERK,
U.S. DISTRICT COURT
SOUTHERN DISTRICT
OF TEXAS
FILED
AUG 7, 1986
Jesse E. Clark, Clerk
By Deputy D. Justice

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

In the Matter of Establishment Inspection of MOSHER STEEL COMPANY

CA No. H-86-233M

MEMORANDUM AND RECOMMENDATION

Pending before the Court is the motion to quash administrative inspection warrant, filed by movant, Mosher Steel Company, on May 13, 1986. Movant seeks by its motion to quash the inspection warrant issued by United States Magistrate George A. Kelt, Jr. on May 7, 1986, ordering officers of the Occupational Safety and Health Administration, United States Department of Labor (OSHA) to conduct a programmed safety inspection of Mosher Steel Company, 3910 Washington Avenue, Houston, Texas.[1] Although the inspection warrant ordered OSHA to conduct the inspection within ten (10) days, officers of Mosher Steel refused to permit entry on the premises by OSHA inspectors and

[1] The inspection warrant actually listed the address of the workplace to be inspected as 2910 Washington Avenue rather than the correct address of 3910 Washington Avenue. The incorrect address was apparently the result of an undetected typographical error. Movant initially assigned the incorrect address as one ground to quash the warrant. This ground was withdrawn at the hearing on the motion held July 23, 1986.

requested copies of the warrant and the supporting application and affidavits for submission to their attorneys.[2] Movant then filed the pending motion on May 13, 1986, and the matter is now before the courts.[3]

I.

Movant seeks to have the inspection warrant quashed because of a number of perceived flaws in the warrant application as follows: the underlying affidavit in support of the warrant does not demonstrate sufficient administrative probable cause; the affidavit is not sworn to on any personal knowledge of the affiant; the affidavit contained false and misleading statements as to the actual OSHA inspection history of Mosher made intentionally and/or with reckless disregard for the truth;[4] and the warrant authorizes the inspection to take place at an address for premises not owned by Mosher.[5]

---

[2] Movant, through the affidavit of Mr. Oscar W. Stewart, Jr., Chairman and Chief Executive Officer of Mosher Steel Company, denies that OSHA inspector Dark was denied entry into the Mosher facilities. Mr. Stewart did not elaborate on what might have occurred had Mr. Dark insisted upon entry for purposes of executing the inspection warrant, and, in any event, the warrant has not been executed.

[3] As noted in *Brock v. Gretna, Mach & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985), the movant had the option of seeking to quash the warrant before execution or refusing entry and challenging the warrant in resulting civil contempt proceedings. Since this motion to quash was filed before either the expiration of the ten days or before a forced entry was attempted, it is immaterial whether or not entry was technically denied.

[4] This was withdrawn as a ground to quash the warrant at the hearing on July 23, 1986, insofar as it involved a *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) challenge. Movant still urges, however, that an accurate inspection history is necessary to establish administrative probable cause and the inaccuracy is fatal to the warrant.

[5] The erroneous address was the result of an apparent typographical error. This was likewise dropped at the hearing as a ground to quash the warrant.

In its memorandum filed in support of the motion to quash, movant elucidated on the lack of administrative probably cause argument. Movant, citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978), sets forth the two-prong test of administrative probable cause. An inspection warrant will be sustained if (1) authorized by statute and pursuant to an administrative plan containing specific neutral criteria and (2) the application adequately explains why the particular establishment is within the program. Movant contends that the affidavit and the materials in support of the application submitted to the magistrate fail to show probable cause because the actual establishment list was not provided to the magistrate; there was no explanation of additions to and deletions from the establishment list; and the prior inspection history of movant as set out in the affidavit in support of the warrant is incorrect.

The Secretary of Labor filed his response in opposition to the motion to quash on June 3, 1986. Following the secretary's response, movant filed its reply to the response and further refined its position as to the invalidity of the warrant. Movant now contends that the warrant fails to establish probably cause because:

A. The affidavit failed to state that it was based on the affiant's personal knowledge;

B. The affidavit failed to explain, pursuant to *Gretna*, why an inspection of the particular establishment is within the program; and

C. The affidavit failed to provide the actual inspection history of Mosher Steel Company.

For the reasons set out in detail below, movant's arguments are without merit, and it is RECOMMENDED that the motion to quash be DENIED.

II.

Movant, citing the case of *Giordenello v. United States,*[6] contends an affidavit to be sufficient to support a search warrant must contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein. The Court disagrees.

In the affidavit in support of the request for the inspection warrant, the affiant, Phillip J. Nessler, stated as follows:

> 1. I am a Safety Supervisor for the Houston Area OSHA Office which is responsible for enforcing the Act in 26 counties of Southeast Texas, and as part of my official duties I schedule inspections for compliance officers under my control to conduct.

This recitation of Nessler's occupation and job title does not, according to movant, demonstrate personal knowledge of the matters contained in the affidavit and falls short of the *Giordenello* standard. This is the same type of hypertechnical reasoning condemned by the Supreme Court in *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741 (1965). The magistrate in this case could reasonably presume that a supervisor in an area OSHA office who, as part of his official duties scheduled compliance inspections for those working under his supervision, had personal knowledge of the compliance inspection programs promulgated by the Secretary of Labor. The magistrate could reasonably presume that such an official had personal knowledge of the official publications received by his office including the compliance

---

[6] 857 U.S. 480, 78 S.Ct. 1245 (1958). *Giordenello* did not involve a search warrant but rather involved the interrelationship of complaints and arrest warrants and Rules 3 and 4, Fed.R.Cr.P. *Giordenello* did not require arrest or search warrants to be based upon personal knowledge of the affiant.

programming instructions CPL 2.45A CH-10, submitted as Exhibit 1 with the affidavit; OSHA instruction CPL 2.25F, Appendix B, submitted as Exhibit 2 with the affidavit; and statewide industry rank report by lost work day injury rate, submitted as Exhibit 3 with the affidavit. The magistrate does not have to presume that these materials, stating the nature of the program and purporting to be an administrative inspection program, were devised by Mr. Nessler for his own purposes and to harass Mosher Steel Company. This is particularly so since movant has never raised a question of the authenticity of the documents furnished and indeed admitted at the hearing that the documents and Nessler affidavit would meet the first prong of the Fifth Circuit *Gretna* test, i.e, the plan "contains sufficient specific neutral criteria as required by *Barlow's*", 769 F.2d at 1113. Although Mr. Kessler does not state in his affidavit that he is speaking of his own personal knowledge, a common sense and realistic interpretation of the warrant request by the magistrate required by *Ventresca* leads to the conclusion that Mr. Kessler knew whereof he spoke regarding the OSHA inspection plan and the selection for inspection of Mosher thereunder as a target for inspection. *Giordenello* is not to the contrary.

III.

Movant's primary attack upon the inspection warrant is its attack upon the alleged failure to explain, pursuant to *Gretna*, why an inspection of Mosher Steel Company is within the program. Movant, citing footnote 6 of *Gretna* that, "We see no reason why OSHA could not have provided the court with the relevant (establishment) lists from Louisiana, encoded to protect the identity of other inspection targets," and quoting the Court's statement that "the application contained neither the establishment list nor a

description of the procedure followed in the selection of *Gretna,"* takes the position that the Court has adopted a per se rule that a warrant application will fail constitutional muster unless the establishment list is presented to the magistrate. Again the Court disagrees.

Mr. Nessler's affidavit explains the procedure followed in the selection of Mosher as follows:

> 6. This establishment was selected for a programmed safety inspection pursuant to a scheduling system based upon objective selection criteria, i.e., OSHA CPL 2.45A and its subsequent changes and Chapter II, Chapter III, D.4., and CPL 2.25F, and its subsequent changes, Appendix B.
>
> 7. The Houston Area Office has instituted a scheduling system for programming safety inspections using the objection selection criteria set out in OSHA CPL 2.45A and its subsequent changes, Chapter II and III D.4., and OSHA CPL 2.25F, and its subsequent changes, Appendix B. Copies of these directives are marked Exhibit #1 and Exhibit #2, attached to this affidavit, and incorporated herein.
>
> . . .
>
> 8. The initial selection of a particular category of employment for programmed inspection activity (i.e., health, safety, construction, maritime) is made in accordance with the annual Field Operations Program Plan. The Program Plan enables each Area OSHA Office to identify program activities, determine priorities and assign resources accurately. The Program Plan for the Houston OSHA Area Office has projected that 91 general industry safety inspections are to be completed in fiscal year 1986 and that 88 records review visits will be made for a total of 179 programmed safety inspections (CPL 2.45A and its subsequent changes, Chapter II, pages II-7 thru II-16).

9. The National Office provides the Area OSHA offices with a Statewide Industry Ranking Report ranking 4-digit SIC Codes (Standard Industrial Classification Codes) according to lost workday injury (LWDI) rate of 3.4 or greater per 100 full-time employees are included on this report. The industries are ranked on this Report beginning with the industry with the highest LWDI rate first and continuing down to the industries with a LWDI rate of 3.4. The SIC code for this employer is SIC 3441. SIC 3441 appears on the Industry Ranking Report used for fiscal year 1985 for the State of Texas and its LWDI rate is 7.0. A copy of this Industry Ranking Report for the State of Texas is marked as Exhibit #3, is attached to this affidavit, and incorporated herein. Since this was the report used to schedule this inspection in fiscal year 1985 from which it was carried over to 1986, SIC 3441 also appears on the Industry Ranking Report used for fiscal year 1986 and its LWDI rate is 8.9.

10. *The National Office also provides each OSHA office with a list of establishments for each SIC on the Statewide Industry Ranking Report located within the Area Office's jurisdiction.* Establishments with ten or fewer employees are deleted from the list at the National Office level. *The Area Director is instructed to make appropriate additions to or deletions from the list* (See CPL 2.45A and its subsequent changes, pages II-10 thru II-12), prior to use of the list for inspection purposes.

. . .

14. The methodology used in the selection of particular establishments from the establishment list for inspection purposes is as follows:

A. The Area Director takes the projected number of General Industry safety inspection and the number of record inspections from the Field Operations Program Plan, doubles the

number, and subtracts the uncompleted inspection carried forward from previous fiscal year, if any. (ref. CPL 2.45A and its subsequent changes, Chapter II, pages II-11 thru II-13). He then numbers the establishments on the Establishment List consecutively until this number is reached. This forms the inspection register. The inspection register is then divided into two cycles with those establishments listed in the first one-half of the list in cycle one and those establishments in the second one-half in cycle two.

B. Within an inspection cycle, establishments may be inspected in any order that makes efficient use of resources. However, each inspection cycle must be completed with only limited exceptions before a new cycle is begun. (See CPL 2.45A and its subsequent changes, Chapter II, pages II-13 thru II-16). An inspection cycle is completed when all eligible establishments within the cycle are either inspected, exempted from inspection following a review of an establishment's work injury record (see CPL 2.45A Chapter III, D.4., pages III-28 thru III-33), or exempted far other reasons. (CPL 2.45A and its subsequent changes, Chapter II, pages II-9 thru II-17).

15. To determine which establishments the Houston Area Office should schedule programmed safety inspections for, the following procedure was used. Additions and deletions from the establishment list were made. (CPL 2.45A and its subsequent changes, Chapter II, pages II-07 thru II-17). The establishments on the Revised Establishment List were then numbered consecutively. After determining the number of programmed safety inspections to be conducted in the fiscal year, this number was doubled to determine the total number of establishments to be placed on the inspection

register and the carry-forward inspection, if any, were subtracted. By way of explanation, it should be noted that the projected number of inspections is doubled because it is estimated that fifty percent of the establishments scheduled for inspection may not be inspected for reasons such as the establishments employ ten or fewer employees, are no longer in business, or have experienced a lost workday injury rate below the national average.

16. The projected number of programmed safety inspections for the Houston Area Office in fiscal year 1986 is 179. In addition, the Area Office had three uncompleted safety inspections at the close of fiscal year 1985 which had to be carried forward (CPL 2.45A and its subsequent changes, Chapter II, pages II-11 thru II-13). The number of programmed safety inspections was doubled, the uncompleted safety inspections from the previous fiscal year were subtracted and the first 356 establishments on the Establishment List were selected in consecutive order to form the inspection register. 356 was used instead of 355 to permit two equal cycles of 178. The 356 establishments were then divided into two inspection cycles, as described in Paragraph 14, each containing 178 establishments. Mosher Steel Company was selected for a programmed safety inspection during the first cycle because it was one of the establishments carried over from fiscal year 1985. However, it was also duplicated on the 1986 establishment list and deleted from the Cycle I listing in view of the carryover from 1985. Of the establishments contained in the first inspection cycle and carryovers, 119 establishments had been inspected, deleted, or exempted or were in the process of being inspected at the time this inspection was attempted.

. . .

The magistrate could reasonably conclude from the above description of the preparation of the inspection register from the initial receipt of the establishment list in the Houston Area OSHA office as provided by the National Office, through the additions and deletions by the Houston Office as authorized by the regulations, that Mosher was randomly and appropriately selected under the plan and was not arbitrarily selected by local officials just to harass Mosher.

The Fifth Circuit in *Gretna* also stated that the magistrate should be informed of the Secretary's perception of the desired inspection frequency and the particular establishment's prior inspection history. Accordingly, the Nessler affidavit stated:

> 11. In accordance with the Secretary's perception of the desired frequency of inspections of establishments with more than 10 employees and with high hazard standard industrial classifications, where any programmed safety inspection or a substantially complete unprogrammed safety inspection has been conducted during fiscal year 1984, 1985 or the current fiscal year, said establishment is deleted from the establishment list and is not subject to scheduling for inspection purposes. The actual inspection history of Mosher Steel Company located at 3910 Washington Avenue, Houston, Texas, is as follows:
>
> 5/22/83 Inspection Non-serious citation issued
>
> 8/10/76 Inspection No citation issued
>
> 10/11/77 Inspection No citation issued
>
> 1/31/78 Inspection Serious citation and non-serious citation issued
>
> 9/15/78 Inspection Serious citation and non-serious citation issued

1/31/80 Inspection No citation issued

Accordingly, the actual inspection history for the subject establishment did not meet the criteria for deletion from the establishment list.

In spite of the detailed selection process revealed to the magistrate, movant takes the position that failure of the Court to view the actual establishment list is fatal to the warrant.[7] Movant claims that without reviewing the actual establishment list (either encoded or under seal) the Court cannot be assured that no arbitrary additions or deletions were made to the list in order to select movant for an inspection.

Movant's argument is without merit. The Nessler affidavit discusses additions and deletions to the original establishment list received from the National Office in Paragraphs 10 and 15 set out above as well as the following:

12. The Area Director is instructed to make additions to the establishment list prior to use of the list for scheduling purposes when an establishment is believed to be within a SIC on the SIC List but does not appear on the establishment list provided by the National Office (Code AA) or the establishment has more than 10 employees but was erroneously removed by the National Office from the list

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[7] Mr. Nessler did, in fact, offer to submit the establishment list to the Court and his affidavit reflects the offer of an *in camera* inspection. Feeling that the detailed information submitted under oath was sufficient, the Court, perhaps not as familiar with *Gretna* as he should have been, declined the offer. The movant is correct, however, in that the actual establishment list cannot now be considered in determining whether the instant warrant meets the requirements of *Gretna* and *Barlow's*. At the hearing movant stated his belief that additional statistical information would have been revealed had the Court reviewed the establishment list. If necessary an encoded establishment list could be reviewed or an establishment list reviewed *in camera* and sealed for the review of the District Court or the Fifth Circuit could be accepted.

(Code BB). Mosher Steel Company was not added to the establishment list at the Area Office level, but was on the establishment list provided by the National Office.

13. After all appropriate additions and deletions have been made, the establishment list may be used for scheduling purposes. The list is CONFIDENTIAL information for OSHA administrative use only and its disclosure may violate § 17F of the Act; however, the 1985 and 1986 lists are available for *in camera* review by this Court upon request

The Court interpreted the Nessler affidavit to say that additions to and deletions from the establishment list were made in accordance with the administrative program only for the following reasons:

a Additions

Code	Description
AA	Establishment is believed to be within a SIC on one of the SIC Lists provided but does not appear on the corresponding establishment list. Additions shall be placed on the proper Establishment List in accordance with the listing criterion used; e.g., alphabetically, by size, etc.
BB	Establishment has more than 10 employees but was erroneous removed by the National Office from the list.

b Deletions.

Code	Description
A	Establishment could not be located, is no longer in business or is not within Area Office area.
B	Nonplant corporate office or headquarters.
C	The correct SIC for the establishment is not on the current High Rate Safety or the current Health SIC List.

. . .

D FOR SAFETY ONLY: Any programmed safety inspection or a substantially complete unprogrammed safety inspection conducted within the current or previous 2 fiscal years.

. . .

E Establishment had no more than 10 employees at any time during the previous 12 months.

F Establishment is found to have an LWDI rate below the lowest average rate for manufacturing published BLS rate over the last 5 years when that rate is calculated by a CSHC who is conducting a health inspection. (See E.2.b.(l) (g)l.)

G Other reasons for deletion not listed above. Approval for deletion shall be requested from the Regional Administrator and approved by the Director of Field Operations.

EXCEPTION: Approval from the National Office is not required when deletion code G is used to eliminate duplicate listings or establishments not within OSHA's jurisdiction.

The parties agreed at the hearing that the above interpretation by the Court was correct. It appears to the Court, therefore, that none of the reasons for the local additions to or deletions from the establishment list are or could be unreasonable or arbitrary. In any event Mosher Steel was not locally added to the list but was on the list received from the National Office.[8]

---

[8] Movant contends that *Gretna* requires the Secretary to justify deletions from as well as additions to this list. The Secretary believes that only additions to the list must be explained. It is not necessary to resolve this issue because all additions and deletions will be justified if made only for the purposes stated in the program.

Movant contends that the issuing magistrate must review the establishment list to verify that there were no unjust or arbitrary additions to or deletions from that list, that is there are no additions or deletions for reasons other than those permitted or required by the plan. Without the personal review of the magistrate unauthorized additions to or deletions from the establishment list might go undetected according to the movant. The difficulty with that position is that it would require the magistrate to verify the information submitted to him under oath by the affiant. It is not the function of the magistrate to act "as the Secretary's auditor," *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1 (1st Cir, 1983). The issuing court is entitled to rely upon the sworn affidavit of Mr. Nessler particularly in the absence of any allegations of wrongdoing. Nor is the magistrate obligated or authorized to inquire into the facts or statistics underlying the safety inspection program established by the Secretary, *Brock v. Gretna Mach. & Ironworks, Inc.*, 769 F.2d 1110, 1113 (5th Cir. 1985). See also *Donovan v. Mosher Steel Co.*, __F.2d __, No. 85-7210, (11th Cir. June 25, 1986). It is not an essential or a per se rule that the magistrate personally view the establishment list so long as the preparation of it is sufficiently explained to insure that the company to be inspected is not arbitrarily selected. *Gretna* is not the contrary.

IV.

Finally, movant contends that the inspection history of Mosher Steel was incorrectly recited in the affidavit to the Court and that this inaccuracy is fatal to a probable cause finding. The history given by the affiant and the actual history according to the movant are as follows:

Date of Inspection	Result per Affiant	Result per Movant
5/22/83[9]	Non-serious citation issued	No inspection
8/10/76	No citation issued	No inspection
10/11/77	No citation issued	No citation issued
1/31/78	Serious citation	3 serious citations, one of which was dropped
	Non-Serious citation	1 non-serious citation
9/15/78	Serious citation	9 serious citations
	Non-serious citation	2 non-serious citations
1/30/80	No citation	No inspection

Movant contends that since the Fifth Circuit in *Gretna* mandated that an accurate inspection history be furnished to the magistrate it follows that an inaccurate inspection history will invalidate the warrant. The secretary contends that the only relevance of the inspection history is to insure that the particular subject of the inspection was not inspected during the fiscal years 1984-1986, and that the Riddles affidavit shows conclusively that to be the case.

The Court agrees with the secretary. Since Mosher has not been inspected subsequently to either 1978 (if the movant is correct) or 1980 (if the secretary is correct), it is not exempted from the 1986 inspection and entitled to be deleted from the list pursuant to Code D. While the inaccuracy may be unfortunate, if in fact there was an inaccuracy, it is difficult to see that Mosher was injured thereby. Mr. Nessler's affidavit shows three more inspections than that to which movant admits. The greater the number of inspections, the

[9] The secretary now informs the Court that 5/23/83 is also a typographical error and the correct date should be 5/22/73. The Riddles affidavit submitted by movant shows that there was no inspection in 1983. Movant's memorandum states that an inspection was scheduled for May 22, 1983 but was not undertaken because Mosher contested the warrant prior to inspection.

greater the likelihood or harassment. The Nessler affidavit shows two serious citations and three non-serious citations were issued on OSHA inspections while the movant admits to twelve serious and three non-serious citations. It would seem logical to the Court that the greater the number of serious citations being issued the greater the number of OSHA safety inspections should be. The error in the inspection history, if any, was certainly harmless.

V.

The inspection warrant requested by the secretary and issued by the Court is certainly limited in scope and a minimal intrusion onto the premises of Mosher. In fact, if Mosher's injury records verify that its last workday injury rate is below the lowest rate attained over the last five years by manufacturing industries as published by the Bureau of Labor Statistics, it will be exempt and the premises will not further be inspected. Only if Mosher's injury rate exceeds the national average will the inspection be anything other than a records check.

This limited scope warrant is plainly based upon an adequate administrative inspection program of neutral criteria (which movant concedes) and involves the random, non-arbitrary selection of Mosher Steel as its subject (which movant disputes). Administrative probable cause exists and movant's motion to quash should be denied.

Mosher is apparently engaged in a "stop OSHA" strategy envisioned by the dissenters in *Barlow's*. *See Donovan v. Mosher Steel Co., supra.* Movant admits that a 1983 planned inspection was stopped by Court intervention. At least two of the three grounds raised in this action are frivolous and appropriately could support Rule 11 sanctions.

It is therefore RECOMMENDED that movant's motion to quash the inspection warrant be DENIED. It is further

RECOMMENDED that the Court order that the inspection warrant to be executed forthwith.

The Clerk shall file this instrument and forthwith mail a copy to all parties. Within ten (10) days after being served with a copy any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C). Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. The original of any written objections shall be filed with the U.S. District Clerk, P. O. Box 61010, Houston, Texas 77208; Attention: Diane Justice. Copies of such objections shall be mailed to the opposing party and to the chambers of the undersigned, P.O. Box 61147, U.S. Courthouse, Houston, Texas 77208.

DONE at Houston, Texas, on this the 7th day of August, 1986.

GEORGE A. KELT, JR.

GEORGE A. KELT, JR.
United States Magistrate

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 5 1986
ROBERT H. SHEMWELL, CLERK
BY SM
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

IN THE MATTER OF ESTABLISHMENT INSPECTION OF INDUSTRIAL STEEL PRODUCTS COMPANY, INC.

MISC. NO 86-70
JUDGE STAGG

MEMORANDUM RULING

This matter requires the court to review the constitutionality of an administrative search warrant issued to the Occupational Safety and Health Administration ("OSHA"). On August 25, 1986, United States Magistrate Robert Shemwell signed a warrant based upon the affidavit of W. A. Womack, an OSHA compliance officer, permitting a "programed" inspection of the work place of Industrial Steel Products Company, Inc. ("ISPCI") in Shreveport, Louisiana. Such inspections are authorized by § 8(a) of the Occupational Safety and Health Act of 1970. 29 U.S.C. § 657(a). 29 C.F.R. § 1903.4(d) permits the *ex parte* application for an inspection warrant. Before the warrant issued by Magistrate Shemwell was executed, ISPCI filed a motion to quash. On December 1, 1986, a hearing was held before Magistrate James M. Barton on this motion to quash. ISPCI had subpoenaed

Womack to appear at that hearing. OSHA moved to quash the subpoena. This motion was granted by the magistrate. Following the hearing, the magistrate entered a report and recommendation that ISPCI's motion to quash the administrative inspection warrant issued to OSHA be denied. ISPCI objected to this report and recommendation and has filed various pleadings with this court.

The leading case on OSHA inspection warrants is *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978). The *Barlow's* court held that warrantless OSHA inspections violated the commercial establishment's Fourth Amendment rights; however, the court further ruled that the secretary of Labor did not have to demonstrate probable cause before a warrant would issue. 98 S. Ct. at 1824. The Barlow's court outlined OSHA's burden in obtaining a warrant as follows:

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court,* 387 U.S. at 538, 87 S. Ct., at 1736. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

Id. at 1824-25.

The United States Court of Appeals for the Fifth Circuit considered the *Barlow's* warrant requirements in *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985). In *Gretna*, the court noted that "[a]n administrative warrant will pass constitutional muster if it issues pursuant to a plan based on sufficient specific neutral criteria and the warrant application adequately explains why an inspection of the particular establishment is within the program." *Id.* at 1112. The *Gretna* court defined the dual function of the district court in reviewing the OSHA warrant application as follows:

> It is first incumbent upon the court to review the plan itself to ensure that it contains the specific neutral criteria mandated *Barlow's*. The court must do so in order to "balanc[e] the need to search against the invasion which the search entails." * * *
>
> The second and coequally important function of the court is the determination that the particular establishment was appropriately selected under the plan. This requires a consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment. The court should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the establishment list and the actual inspection history of the business in question.

Id. (Quoting *Camara v. Municipal Court*, 387 U.S. 523, 537, 87 S. Ct. 1727, 1735 (1967)).

ISPCI contends that the magistrate erred in quashing the subpoena issued to the warrant affiant, Womack. ISPCI also argues that the warrant does not meet the standards set by *Barlow's* and *Gretna*. ISPCI specifically submits the

following discrepancies: (1) that the plan is not reasonable or based on neutral criteria; (2) that it is not being applied in a neutral and non-discriminatory manner; (3) that the affidavit is not based on personal knowledge; and (4) that OSHA is obligated to turn over the establishment inspection lists to the magistrate before a warrant may issue.

MOTION TO QUASH SUBPOENA

There is no merit to ISPCI's contention that it was entitled to supplement the warrant application with live testimony by Womack at the hearing on the motion to quash the warrant. In *Gretna,* the Fifth Circuit ruled that the "magistrate must decide whether to issue the warrant based on information provided by the application or in qualified conjunction with the application. Judicial review of the validity of the search warrant is based on that same evidence." 769 F.2d at 1114. The Fifth, Tenth, and Eleventh Circuits all hold that in reviewing the validity of an OSHA administrative inspection warrant, the court may not go beyond the four corners of the affidavit and warrant application. *See Gretna,* 769 F.2d at 1114; *Donovan v. Hackney, Inc.,* 769 F.2d 650, 653 (10th Cir. 1985); *Donovan v. Mosher Steel Co.,* 791 F.2d 1535, 1537 (11th Cir. 1986). Since ISPCI has made no contention that fraud or ill practice was used in securing the warrant, no evidence outside the application can be heard on the motion to quash. *Gretna*, 769 F.2d at 1114; *See also Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674 (1978). Accordingly, the magistrate made no error in quashing the subpoena issued to Womack.

REASONABLENESS, NEUTRALITY, AND METHODOLOGY OF OSHA PLAN

The magistrate found that the OSHA inspection plan met the criteria of *Barlow's* and *Gretna.* ISPCI contends otherwise.

The affidavit in support of the inspection warrant discloses that the OSHA plan for programed inspections is indeed based upon "a general administrative plan for the enforcement of the act derived from neutral sources. . . ." *Barlow's*, 98 S. Ct. at 1825. The warrant application included a copy of the plan for programmed safety inspections such as the one scheduled for ISPCI. Additionally, the affidavit explains:

> 8. The initial selection of a particular category of employment for programmed inspection activity (i.e., health, safety, construction, maritime) is made in accordance with the annual Field Operations Program Plan. The Program Plan enables each Area OSHA office to project inspection activity, identify program activities, determine priorities and assign resources accurately. The Program Plan for the Baton Rouge OSHA Area Office has projected that 166 general industry safety inspections are to be completed in fiscal year 1986 and that 163 records review visits will be made for a total of 329 programed safety inspections (CPL 2.45A and its subsequent changes, Chapter II, pages II-7 through II-16).
>
> 9. The National Office provides the Area OSHA offices with a Statewide Industry Ranking Report ranking 4-digit SIC Codes (Standsard Industrial Classification Codes) according to lost workday injury rates. Only industries in a State which have a lost workday injury (LWDI) rate of 3.4 or greater per 100 full-time employees are included on this report. The industries are ranked on this Report beginning with the industry with the highest LWDI rate first and continuing down to the industries with a LWDI rate of 3.4. The SIC code for this employer is SIC 3441. SIC 3441 appears on the Industry Ranking Report for the State of Louisiana and its LWDI rate is 9.7. A copy of the Industry Ranking Report for the State of Louisiana is marked as Exhibit #3, is attached to this affidavit, and incorporated herein.

The importance of the 3.4 LWDI rate is that it is the lowest national average for all private sector industry for the last five years. Since the LWDI rate for ISPCI's Standard Industrial Classification code (SIC) is 9.7, it is above the national average. Thus, ISPCI's SIC was in the high rate establishment list for safety inspections. *See* CPL 2.45A page II-7 through II-10. ISPCI's SIC is ranked as the thirteenth highest in the State of Louisiana for lost workday injuries. *See* Exhibit 3 to Womack affidavit.

The national OSHA office supplies the local OSHA office with a list of establishments for each SIC. Establishments with fewer than ten employees are deleted by the national office. *See Womack* affidavit, paragraph 10. The area director is then empowered to make local additions and deletions. *Id.* The permissable additions and deletions are governed by CPL 2.45A pages II-10 through II-12. The authorized additions include adding establishments which are believed to be within the SIC code but do not appear on the establishment list sent by the national OSHA office and establishments with more than ten employees erroneously removed by the national office. *See* CPL 2.45A page II-10. The approved local deletions include removing establishments who were no longer in business, who are merely corporate headquarters, who do not have ten or more employees, who are within a SIC which is not on the current high rate list, who have a LWDI rate below the lowest average for manufacturing published by the Bureau of Labor statistics, or who have been the subject of a safety inspection within the current or two previous fiscal years. *See* CPS 2.45A page II-11.

After the local additions and deletions have been made, the establishment list is then ready to be used for scheduling

safety inspections. The methodology for selecting establishments is contained in paragraphs 14, 15, and 16 of the Womack affidavit:

> 14. The methodology used in the selection of particular establishments from the establishment list for inspection purposes is as follows:
>
> A. The Area Director takes the projected number of General Industry safety inspections and the number of records inspections from the Field Operations Program Plan, doubles the number, and subtracts the uncompleted inspections carried forward from previous fiscal year, if any. (ref. CPL 2.45A and its subsequent changes, Chapter II, pages II-11 thru II-13). He then numbers the establishments on the Establishment List consecutively until this number is reached. This forms the inspection register. The inspection register is then divided into two cycles with those establishments listed in the first one-half of the list in cycle one and those establishments in the second one-half in cycle two.
>
> B. Within an inspection cycle, establishments may be inspected in any order that makes efficient use of resources. However, each inspection cycle must be completed with only limited exceptions before a new cycle is begun. (See CPL 2.45A and its subsequent changes, Chapter II, pages II-13 thru II-16). An inspection cycle is completed when all eligible establishments within the cycle are either inspected, exempted from inspection following a review of an establishment's work injury record (see CPL 2.45A Chapter III, D.4., Pages III-2 thru III-33), or exempted for other reason. (CPL 2.45A and its subsequent changes, Chapter II, Pages II-9 thru II-17).

15. To determine which establishments the Baton Rouge Area Office should schedule programmed safety inspections for, the following procedure was used. Additions to and deletions from the Establishment List were made. (CPL 2.45A and its subsequent changes, Chapter II, pages II-7 through II-17). The establishments on the Revised Establishment List were then numbered consecutively. After determining the number of programmed safety inspections to be conducted in the fiscal year, this number was doubled to determine the total number of establishments to be placed on the inspection register and the carry-forward inspections, if any, were subtracted. By way of explanation, it should be noted that the projected number of inspections is doubled because it is estimated that fifty percent of the establishments scheduled for inspection may not be inspected for reasons such as the establishments employ ten or fewer employees, are no longer in business, or have experienced a lost workday injury rate below the national average.

16. The projected number of programmed safety inspections for the Baton Rouge Area Office in fiscal year 1986 was 329. In addition, the Baton Rouge Area Office had 162 uncompleted safety inspections at the close of fiscal year 1985 which had to be carried forward (CPL 2.45A and its subsequent changes, Chapter II, page II-11 through II-13). The number of programmed safety inspections was doubled, the uncompleted safety inspections from the previous fiscal year were subtracted, and the first 496 establishments on the Establishment List were selected in consecutive order to form the inspection register. The 496 establishments were then divided into two inspection cycles, as described in Paragraph 14, each containing 248 establishments. Industrial Steel Products Company, Inc. was selected for a programmed safety

> inspection during the first cycle. Of the establishments contained in the first inspection cycle, 180 establishments had been inspected, deleted, or exempted or were in the process of being inspected at the time this inspection was attempted.

Generally, if an establishment's LWDI rate is below the lowest rate for the last five years by manufacturing industries, then no inspection will be made. However, under CPL 2.71, a full inspection is authorized for every tenth establishment regardless of the LWDI rate for the establishment. ISPCI is an establishment which will receive complete inspection under the every tenth-establishment rule. *See* Womack affidavit, Paragraph 17.

ISPCI contends that the inspection plan does not meet the reasonableness and neutrality requirement of *Barlow's:* because the secretary selects the category of establishments to be inspected, i.e. high hazard general industry; because the affidavit does not describe how employers are categorized into particular SIC groups; because the establishment list is not given to the magistrate and it is not shown how the list is compiled; and because there was no explanation of the number of additions, deletions, and carryover inspections. ISPCI contends that the OSHA plan results in the repeated inspection of a few establishments and that potential inaccuracies in the list make the present plan unreasonable.

This court finds ISPCI's contentions have no merit under *Barlow's* and *Gretna.* This court finds that the plan is based on an appropriate "general administrative p.a. . . . derived from neutral sources. . . ." *Barlow's,* 98 S. Ct. at 1825. In making this determination, this court is mindful of the Fifth Circuit's admonishment in *Gretna:*

> This adequacy determination is to be made by examining the inspection plan itself to ascertain

> that it contains the requisite neutral criteria. The court is neither obliged nor authorized to inquire into the facts presaging the formulation of the plan. It is not the function of the court to question the Secretary's underlying decision that a particular toxic substance is a threat to the health of workers or, for example, to second-guess the Secretary's interpretation of the scientific or medical evidence analyzed in the development of the plan.

769 F.2d at 1113.

Here, the plan is based on the reasonable and neutral criteria of high lost workday injury rates for a given category of manufacturers. It is not this court's function to second-guess the Secretary's decision that this criteria is an appropriate one for scheduling inspections. It is sufficient that the criteria be neutral and designed for the nondiscretionary enforcement of the act. Here, the selection of establishments with LWDI rates above the national average is certainly neutral and consistent with the Act's goal of promoting industrial safety. There is no factual basis for ISPCI's contentions that this plan results in the repeated inspection of a few establishments or that the OSHA lists are inherently inaccurate.

Further, the affidavits in this case sets forth the methodology by which ISPCI was selected for a complete programmed inspection. In *Gretna,* the court noted that the OSHA warrant application "contained neither the establishment list nor a description of the procedure followed in the selection of Gretna. Was it by lot? Was it at random? Was it by design? If by design, what were the facts underlying the purposeful selection?" 769 F.2d at 1113. By contrast, in this case, it is known that ISPCI was chosen randomly, and not by design, from a list of establishments with a LWDI rate above the national average. The affidavit sets forth the

secretary's desired frequency of inspections and the actual inspection history of ISPCI. *See* affidavit paragraph 10 and 11. Thus, this court is fully informed as to how ISPCI was listed for a complete inspection.

ISPCI complains that the affidavit does not explain what establishments, and the number of establishments, added or deleted to the list at the local level and that the establishment inspection list was not provided to the magistrate. Given the narrowly circumscribed areas in which the local OSHA director has the authority to add or subtract establishments from the list, and given the fact that the additions and subtractions outlined in CPL 2.45A mirror such statutory requirements as the ten-employee rule, this court does not find that the failure to explain the additions and subtractions is fatal to the warrant application. The Supreme Court in requiring a warrant in *Barlow's* did not anticipate "that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions." 98 S. Ct. at 1825. This court finds that a requirement that every addition or substraction be explained in the warrant application would cross the boundary of *Barlow's* stated intention to keep the application process within "manageable proportions ." This court also finds no merit to ISPCI's argument that OSHA must provide the magistrate with a copy of the establishment list before a warrant may issue. *Gretna* contains no such *per se* rule. *See In the Matter of Establishment Inspection of Mosher Steel Co.,* Civil Action No. H-86-233M (S.D. Tex., August 7, 1986). The primary purpose behind the *Barlow's* warrant requirement was to enforce the Fourth Amendment's basic purpose: safeguarding individuals and businesses "against arbitrary invasions by government officials." *Barlow's,* 98 S. Ct. at 1820 (quoting *Camara,* 87 S. Ct. at 1730). The affidavits in this case amply demonstrates that ISPCI was not arbitrarily

chosen by OSHA for an establishment inspection. The Fourth Amendment requires no more in the administrative warrant context. *Barlow's* specifically held that "[p]robable cause in the criminal law sense is not required." 98 S. Ct. at 1824. ISPCI's argument that the magistrate must have the inspection list would do just that. It is not the function of the magistrate to act as the secretary's auditor. *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 5-6 (1st Cir. 1983).

PERSONAL KNOWLEDGE

ISPCI's final attack on the report and recommendation of Magistrate Barton is that the affidavit of W. A. Womack was not based on personal knowledge. Paragraph 1 of the affidavit states that Womack is a compliance officer for the Baton Rouge Area OSHA Office. Womack further states in paragraph 1 that as part of his official duties, he conducts inspections "as assigned by supervision." It was reasonable for the magistrate to conclude that an OSHA compliance officer is personally knowledgable about the national OSHA plans his local office must follow and the procedures and methodology by which ISPCI was selected for complete inspection pursuant to that plan. The Supreme Court has noted, "affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 746 (1965); *see also The Matter of Establishment Inspection of Mosher Steel, supra.*

Accordingly, the Report and Recommendation of Magistrate James M. Barton is hereby ADOPTED and IT IS FURTHER ORDERED that the motion to quash the warrant by ISPCI be DENIED. An Order consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED in Shreveport, Louisiana this 6th day of June, 1987.

TOM STAGG

Tom Stagg, Chief Judge

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
JUNE 10 1987
ROBERT H. SHEMWELL, CLERK
BY SM
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

IN THE MATTER OF ESTABLISHMENT INSPECTION OF INDUSTRIAL STEEL PRODUCTS COMPANY, INC.

MISC. NO. 86-70
JUDGE STAGG

ORDER

For the reasons enumerated in the foregoing Memorandum Ruling,

IT IS ORDERED that the Report and Recommendation of Magistrate James M. Barton is hereby ADOPTED and,

IT IS FURTHER ORDERED that the motion to quash the warrant by ISPCI is DENIED.

DATED AND SIGNED in Shreveport, Louisiana this 6th day of June, 1987.

TOM STAGG
Tom Stagg, Chief Judge

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 5 1986
ROBERT H. SHEMWELL, CLERK
BY CM
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IN THE MATTER OF ESTABLISHMENT INSPECTION OF:
MISCELLANEOUS NO. 86-70
INDUSTRIAL STEEL PRODUCTS COMPANY, INC.

REPORT AND RECOMMENDATION OF MAGISTRATE

In accordance with the minute entry order of United States District Judge Earl E. Veron filed September 2, 1986, the captioned case was referred to the undersigned Magistrate to conduct an evidentiary hearing and to submit a report and recommendation.

The hearing was set initially for September 22, 1986 but subsequently was upset. It was rescheduled for October 20, 1986, and again was upset and rescheduled for December 1, 1986. Hearing on the Motion to Quash the Administrative Search Warrant was held on December 1, 1986 at 10:00 A.M.

Present and representing Industrial Steel Products Company, Inc. were Robert E. Rader, Jr. and John M. Madison. OSHA was represented by Max A. Wernick.

Taken up first at the hearing was OSHA's oral Motion to Quash the Subpoena of affiant W. A. Womack. Industrial

Steel argued that Mr. Womack's testimony was needed to clarify certain issues pertaining directly to the warrant. The United States Supreme Court in *Franks v Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), held that where:

> "... the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing be held."

No allegations of fraud have been made and thus, it is inappropriate to receive evidence beyond the four corners of the search warrant. Therefore, the Motion to Quash the Subpoena of W.A. Womack is GRANTED.

Thereafter, the Motion to Quash the Inspection Warrant was addressed. Movant presented two main contentions: (1) that establishment lists *must* be attached to the warrant application, and (2) that an identification and explanation must be made of the additions and deletions to the establishment list at the local level. Movant argued that these materials must be provided to the court so it can determine whether the selection process is nondiscriminatory.

Movant contended that the reference in *Brock v Gretna Machine and Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985) to "encoded establishment lists" (at page 1113) indicates that the magistrate must be provided the establishment list. Movant also argued that explanations of any local additions and deletions must be included, citing a memorandum opinion by United States District Judge Thompson, Middle District of Alabama, *Brock v Gambles, Inc. and Rex Fronduti*, as authority.

Although, there is little case law giving guidance in this area, the Fifth Circuit recently handed down an opinion, *Brock v. Gretna Machine,* 769 F.2d 1110 (5th Cir. 1985) which discussed the "foundainhead" Supreme Court decision in the administrative warrant area, *Marshall v. Barlows, Inc.,* 436 U.S. 308 (1978). According to the *Gretna* court, the judicial function is dual. First it must review the plan to ensure that it is neutral, taking into consideration whether the warrant is for a programmed inspection or is based on an employee's complaint Secondly, the court must determine whether the particular establishment was appropriately selected under the plan.

Although OSHA argued that movant had not properly put the neutrality of the plan at issue, *Gretna* dictates that this prong be satisfied for the warrant to stand. A review of the warrant dictates that the plan is neutral according to the criteria of *Gretna.* As in *Gretna,* the application included a copy of the scheduling system for programming safety inspections using the objective selection criteria set out in various OSHA regulations. See exhibits I and II.

The affidavit of W.A. Womack described the OSHA plan based on objective selection criteria. Exhibit I beginning at II-7 sets forth the considerations regarding implementation of OSHA's targeting system. Exhibit I at II-10 and 11 describes how additions and deletions are to be made. Following pages set forth how inspections are to be cycled. Exhibit II contains updated information. These materials satisfy the first *Barlows* prong. As the *Gretna* court noted, it is the judicial function to search out neutral criteria *not* to question the Secretary's *formulation* of the plan. See *United States Dept. of Labor v. Kast Metals Corp.,* 744 F.2d 1145 (5th Cir. 1984).

The second prong involving the methodology of selecting the business also has been satisfied. The *Gretna* court stated at 1112:

> "This requires a consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment. The court should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the establishment list and the actual inspection history of the business in question."

As OSHA points out, the affidavit addresses each of these factors:

Factor:	Warrant Application:
1. The plan's industry list for the state in question.	1. Paragraphs 2 and 9 of Womack's affidavit.
2. The methodology used in selection of the particular establishment.	2. Paragraphs 6 through 16 of affidavits.
3. The Secretary's perception of the desired frequency of inspections of companies on the establishment list; and	3. Paragraph 10 of affidavit.
4. The actual inspection history of the business in question.	4. Paragraph 11 of affidavit.

A copy of the affidavit is attached.

Movant argued that both the establishment list and an explanation of its additions and deletions at the local level are necessary to a valid warrant application. The court in *Gretna* was concerned that "the application contained neither the establishment list nor a description of the procedure followed in the selection of *Gretna*." (*Gretna* at 1113).

The court questions, "Was it by lot? Was it at random? Was it by design?" As noted above, although Mr. Womack's affidavit did not include the establishment list, it did set forth the methodology for the selection of particular establishments.

The National office provides an Industry Ranking Report with ranking according to lost work day injury rates. The National office also supplies a list of establishments within the industry codes with local offices directed to make additions and deletions within certain guidelines. From this point, the particular establishments are chosen by doubling the projected number of inspections, subtracting the uncompleted inspections and then numbering the establishments consecutively until this number is reached. Paragraph 11 of Womack's affidavit notes that if any establishment has been inspected within the current or two (2) prior years, it will be deleted.

The directives shown above are sufficient to indicate that Industrial Steel was chosen randomly. OSHA fully revealed its selection process, thus answering the question of how Industrial Steel was included in the register. OSHA indicates that it would provide the establishment list for *in camera* review by the court upon request. See Womack's affidavit, paragraph 13. The magistrate issuing the warrant *chose* not to make such a request.

As OSHA pointed out, Industrial Steel was not on the inspection list by virtue of addition at the local level but was on the establishment list provided by the National office. See Womack's affidavit, paragraph 13. Thus, the *Gretna* court's concern that, where an establishment is added by design, the addition should be reasonably explained to avoid harrassment of businesses, is not an issue in this case.

CONCLUSION:

Considering only the application itself, including affidavit and attached exhibits, the materials set forth an adequate description of the manner in which Industrial Steel was selected for inspection. Industrial Steel underwent general safety inspections on 4/29/77, 9/3/81 and 7/21/83 and general health inspections on 5/18/77 and follow-up on 8/3-10/77. (See Womack's affidavit, paragraph 11). This inspection history substantiates that Industrial Steel has not been targeted for an unreasonable number of inspections suggesting harrassment.

Accordingly, having GRANTED the Motion to Quash the Subpoena of W. A. Womack;

IT IS RECOMMENDED that the Motion to Ouash the Administrative Search Warrant be DENIED.

Under the provisions of 28 U.S.C. 636(b)(1)(C), failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

THUS DONE AND SIGNED in chambers at Shreveport, Louisiana, on this 4th day of December, 1986.

JAMES M. BARTON

James M. Barton
United States Magistrate

No. 88-481

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

INDUSTRIAL STEEL PRODUCTS CO., INC. AND MOSHER STEEL COMPANY, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Administration demonstrated probable cause, in accordance with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), for issuance of administrative warrants to conduct safety inspections of petitioners' steel plants.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-481

INDUSTRIAL STEEL PRODUCTS CO., INC. AND MOSHER STEEL COMPANY, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 845 F.2d 1330. The district courts' opinions (Pet. Supp. App. 1, 19-32) and the magistrates' recommendations (Pet. Supp. App. 2-18, 33-38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988. A timely petition for rehearing was denied on June 27, 1988 (Pet. App. B1-B2). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a court of appeals' decision holding that the Occupational Safety and Health Admin-

istration (OSHA) had demonstrated probable cause, in accordance with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), for issuance of administrative warrants to conduct safety inspections of petitioners' steel plants.

1. The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, authorizes the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce. See 29 U.S.C. 655. The OSH Act also empowers OSHA to enter and inspect workplaces to assure the provision and maintenance of safe and healthful working conditions. See 29 U.S.C. 657(a). As part of its general administrative plan for the enforcement of the Act, OSHA targets a specified number of employer establishments each year for safety inspections. OSHA selects establishments for these "programmed" inspections through specific neutral criteria that take into account, for example, whether the employer is engaged in a "high hazard" industry, whether the establishment's actual "lost work day injury" (LWDI) rate is below the national average, whether the establishment employs ten or fewer persons, and whether the establishment has been inspected in the current or previous two fiscal years. See Pet. App. A4-A6.

In 1986, OSHA scheduled programmed inspections of petitioner Mosher Steel Company's steel plant and petitioner Industrial Steel Products Company's (ISP's) steel fabrication plant (Pet. App. A2). Petitioners' plant representatives refused to consent to the inspections, and OSHA sought and obtained administrative warrants authorizing entry (*ibid.*). In each case, OSHA supported its warrant application with sworn affidavits by local OSHA officials and relevant documents describing the formulation of the agency's programmed inspection plan and its application to petitioners (*Ibid.*; Pet. Supp. App. 5, 23).

Petitioners, proceeding in separate courts, each sought to quash the warrants. The United States District Court for the Southern District of Texas adopted the magistrate's recommendation and denied Mosher's motion to quash. Applying the standards set forth in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), the court agreed that the warrant was properly limited in scope, was "plainly based upon an adequate administrative inspection program of neutral criteria," and "involve[d] the random, nonarbitrary selection of Mosher Steel as its subject" (Pet. Supp. App. 17). The United States District Court for the Western District of Louisiana, also adopting a magistrate's recommendation, likewise denied ISP's motion to quash. It too found that OSHA's warrant application satisfied the *Barlow's, Inc.* probable cause standard. OSHA's application demonstrated that its inspection plan was based on "the reasonable and neutral criteria of high lost workday injury rates for a given category of manufacturers" (Pet. Supp. App. 28). The application also demonstrated "that [petitioner] was chosen randomly * * * from a list of establishments with a LWDI rate above the national average" (*id.* at 28-29).

2. The court of appeals consolidated the two cases and affirmed. Applying this Court's decision in *Barlow's, Inc.*, it concluded that the affidavits and other materials attached to the warrant applications "provided probable cause to issue the warrants" (Pet. App. A1). First, OSHA's inspection plan was based on "specific neutral criteria" from which a magistrate could "determine that the plan as a whole is susceptible of neutral, non-arbitrary application" (*id.* at A4, A6). The plan's neutrality was reflected in its identification and concentration on the largest, most dangerous businesses (*id.* at A6), combined with "the comprehensive inspection of some firms with low actual LWDI rates" (*ibid.*). Second, the warrant applications

contained "more than enough information" to support the magistrate's finding that petitioners were appropriately selected for inspection under the plan's neutral criteria (*id.* at A8-A9). They contained not only the statewide industry ranking reports and OSHA's instructions for developing the administrative plan, but also sworn detailed descriptions of how the plan was executed (*id.* at A9).

The court of appeals refused to examine evidence outside the warrants because petitioners had made no specific allegations of fraud or even arbitrariness (Pet. App. A3, A13-A14). The court observed that petitioners' statistics from local business directories suggested that some competitors may not have been included in OSHA's establishment lists, but it found these purported omissions to be insubstantial. The court concluded that OSHA could reasonably rely on national directories in compiling establishment lists because of the varying methodologies in local directories (*id.* at A12). The mere suggestion that "capricious additions and deletions could have been made at the local level" was insufficient to trigger an expanded inquiry (*id.* at A14).

ARGUMENT

The court of appeals correctly applied this Court's decision in *Barlow's, Inc.* to the particular facts here. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. There is, accordingly, no warrant for this Court's review.[1]

1. This Court held in *Barlow's, Inc.* that the Secretary of Labor must obtain a warrant to conduct a noncon-

[1] This Court has denied petitions for a writ of certiorari pressing arguments similar to those presented here. See *Mosher Steel Co.* v. *Brock*, No. 86-523 (Jan. 12, 1987); *Hackney, Inc.* v. *Brock*, 475 U.S. 1081 (1986).

sensual inspection of business establishments subject to the OSH Act (436 U.S. at 324-325). The Court stressed, however, that the Secretary need not demonstrate probable cause "in the criminal law sense" to obtain such warrants (*id.* at 320). Rather, "probable cause justifying the issuance of a warrant" may be based on evidence of an existing violation or "on a showing that 'reasonable legislative or administrative standards for conducting an inspection * * * are satisfied with respect to a particular [establishment]' " (*id.* at 321, quoting *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967)). This probable cause showing contemplates "rather minimal limitations on [agency] action." *See* v. *City of Seattle,* 387 U.S. 541, 545 (1967)). See *Barlow's, Inc.,* 436 U.S. at 321, 323.

The court of appeals, like numerous other courts of appeals in markedly similar cases, correctly determined that the warrant applications here satisfied the *Barlow's, Inc.* probable cause standard.[2] First, the programmed inspection plan was derived from the specific, neutral criteria of injury rates, workforce size, and frequency of inspection (Pet. App. A6, A10). These criteria represent the types of objective factors that this Court has previously identified as indicative of a plan's neutrality and reasonableness. See *Barlow's, Inc.,* 436 U.S. at 321; *Camara,* 387 U.S. at 538.

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[2] The courts of appeals have repeatedly found that comparable warrant applications satisfy the *Barlow's, Inc.* probable cause requirement. See, *e.g., Pennsylvania Steel Foundry & Machine Co.* v. *Secretary of Labor,* 831 F.2d 1211, 1215 (3d Cir. 1987); *Donovan* v. *Trinity Industries, Inc.,* 824 F.2d 634, 636-637 (8th Cir. 1987); *Donovan* v. *Hackney, Inc.,* 769 F.2d 650, 652-653 (10th Cir. 1986), cert. denied, 475 U.S. 1081 (1986); *Donovan* v. *Wollaston Alloys, Inc.,* 695 F.2d 1, 5 (1st Cir. 1983); *Stoddard Lumber Co.* v. *Marshall,* 627 F.2d 984, 988-989 (9th Cir. 1980); *In re Establishment Inspection of Gilbert & Bennet Mfg.,* 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979).

Second, petitioners were "appropriately selected for inspection under the plan's neutral criteria" (Pet. App. A8). As the court of appeals explained, the affidavits and exhibits accompanying the warrant applications "contain[ed] a detailed description of how the plan was executed" and the precise reasons for inspection of petitioners' establishments (*id.* at A9-A10 (footnote omitted)). Based on these warrant applications, the magistrates plainly had "ample information" from which they could "decide that [petitioners] were appropriately chosen by an application of the plan's neutral criteria" (*id.* at A9).

2. Petitioners apparently do not contend that OSHA's programmed inspection plan was based on non-neutral factors, or that proper application of the plan could not result in their selection for inspection. Rather, they assert (Pet. 4, 5) that the court of appeals misapplied the *Barlow's, Inc.* probable cause standard by improperly imposing on them the burden of proving that the plan is discriminatory and that its discriminatory enforcement was intentional. Petitioners' objections reflect a misunderstanding of the court of appeals' decision. The court did not dispense with the *Barlow's, Inc.* requirement that OSHA affirmatively demonstrate probable cause for issuance of a warrant. The court simply held that the issuing magistrate is entitled to rely on OSHA's sworn representations of how application of the plan's neutral criteria resulted in selection of the particular business unless the party opposing the warrant rebuts OSHA's demonstration of probable cause through a specific factual showing (Pet. App. A13-A14). The court correctly noted that petitioners failed to make such a showing here (*id.* at A14).[3]

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[3] The court of appeals' holding is entirely in accord with *Barlow's, Inc.* The Secretary meets her burden of demonstrating probable cause by showing that the inspection plan is based on neutral criteria and

The court of appeals did not impose an improper burden on petitioners when it refused to look beyond the warrant application in determining whether the Secretary established probable cause. Ordinarily, review of a warrant application is confined to its four corners, and "a presumption of validity" attaches to the affidavit supporting the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171 (1978). To justify further inquiry, the party opposing the warrant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" (*id.* at 155-156; see also *id.* at 171). Moreover, the proponent must prove his "allegation of perjury or reckless disregard * * * by a preponderance of the evidence" (*id.* at 156).

Petitioners' allegations fall far short of what *Franks* requires. Petitioners point to supposed discrepancies between OSHA's establishment lists and the statewide business directories (Pet. 6). But the court of appeals correctly recognized that any such differences result from OSHA's appropriate use of national directories. See Pet. App. A12-A13. Beyond that, petitioners' assertion of omissions amounts to nothing more than a mere suggestion "that capricious additions and deletions could have been made at the local level" (Pet. App. A14). This suggestion is not enough to mandate the further inquiry that petitioners sought, and it is certainly not enough to call for this Court's review.

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that application of the plan resulted in the selection of a particular establishment for review. See 436 U.S. at 320. *Barlow's, Inc.* specifically eschews the imposition of unmanageable requirements on the Secretary (436 U.S. at 321), and plainly does not require, as petitioners suggest (Pet. 7), that the Secretary additionally must demonstrate that the plan is properly applied to every other establishment actually or potentially on the list (845 F.2d at 1337).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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